DE FACTO OFFICERS UNDER UNCONSTITUTIONAL STATUTE.—It may be said that the majority of the courts hold that there can be no *de facto* officer unless a *de jure* office exists; or, to state the rule in a different way, there can be no *de facto* office.[1] The reasoning on which this rule is based seems to be sound, as an unconstitutional statute is universally held to be void *ab initio*.[2] Hence where a statute creating an office is unconstitutional, all of the acts of one acting as an officer under such a statute are held void. And on the same principle it is held by the majority of the courts that where an office has been abolished, or the act by virtue of which it existed has been repealed, a person who assumes to fill the office is not a *de facto* officer.[3] A strict application of this rule necessarily works great hardship, for instance where contracts have been made and work done under the authority of a municipal corporation, and the statute which created the municipality is declared void because unconstitutional. In such case the third person is presumed to have had knowledge of the invalidity of the act, although such a presumption is manifestly often unfair to such person. The earlier English rule was that in order for one to be a *de facto* officer he must claim his office by virtue of some appearance of election or appointment.[4] This rule has been followed by some of the courts of this country.[5] But later Lord Ellenborough defined a *de facto* officer as "one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law;" which is obviously a much more liberal rule.[6]

The courts of this country have laid down many different doctrines on this question, and the decisions cannot be reconciled.[7] It

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[1] Norton *v.* Shelby County, 118 U. S. 425; People *v.* Toal, 85 Cal. 333, 24 Pac. 603; Van Slyke *v.* Ins. Co., 39 Wis. 390, 20 Am. Rep. 50; Farrington *v.* Invest. Co., 1 N. D. 102, 45 N. W. 191; Hildreth *v.* McIntire, 1 J. J. Marsh (Ky.) 206, 19 Am. Dec. 61; People *v.* Knoph, 183 Ill. 410, 56 N. E. 155; MECHEM, PUBLIC OFFICERS, 326.

[2] Finders *v.* Bodle, 58 Neb. 57, 78 N. W. 480.

[3] Gorman *v.* People, 17 Colo. 596, 31 Pac. 335; People *v.* Welch, 225 Ill. 364, 80 N. E. 313; *In re* Hinkle, 31 Kan. 712, 3 Pac. 531. But there is some authority *contra*. Adams *v.* Lindell, 5 Mo. App. 197; Keeling *v.* Railroad, 205 Pa. St. 31, 54 Atl. 485.

[4] King *v.* Lisle, 2 Strange 1090.

[5] See Carleton *v.* People, 10 Mich. 250; Railroad *v.* Railroad, 1 Allen (Mass.) 552; People *v.* Collins, 7 Johns. (N. Y.) 549.

[6] King *v.* Bedford Level, 6 East. 356.

[7] An often quoted definition, given by Chief Justice Butler in State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409, is as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised:

"First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second. Under color of a known and valid appointment or election,

may be stated as settled that where there exists a *de jure* office, a person elected or appointed thereto under an unconstitutional statute is an officer *de facto,* and his acts are valid as to third persons, before the law is adjudged unconstitutional.[8] There would seem to be no reason why the rule should not be the same where the law creating the office is unconstitutional, as in either case the law is void *ab initio* whether it creates the office or provides for an election or appointment, but many of the courts have dogmatically laid down the rule that there can be no *de facto* officer unless there is a *de jure* office, which he claims to fill.[9] Where an unconstitutional statute increases the number of officers to fill *de jure* officers, so that there are more officers than offices, such persons are held to be *de facto* officers.[10] It is settled that where an office exists, and the legislature attempts, by an unconstitutional statute, to abolish it and create another office in its place, a person claiming title to such office is not a *de facto* officer.[11]

In some cases the courts have recognized the hardship of the rule laid down by the majority of the courts, that there can be no *de facto* officer unless he claims to fill a *de jure* office, and have refused to follow the rule.[12] In these cases the courts base their decisions on grounds of justice and expediency rather than on the weight of authority. To allow persons to receive benefits under contracts made under such circumstances, and then collaterally attack the constitutionality of the act under which the contract was made, is manifestly unjust. Until declared void by a competent court, every act

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but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.

"Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

[8] *In re* Ah Lee, 5 Fed. 899; State *v.* Carroll, *supra;* Demarest *v.* New York, 147 N. Y. 203, 41 N. E. 405; Thompson *v.* Couch, 144 Mich. 671, 108 N. W. 363; Cole *v.* Black River Falls, 57 Wis. 110, 14 N. W. 906. *Contra,* State *v.* Fritz, 2 La. Ann. 689. In this case a judge appointed a lawyer to prescribe in his place during his illness, under authority of an unconstitutional statute. The court held that the appointment was a nullity, and the acts of the lawyer as judge void.

[9] Norton *v.* Shelby County, *supra.*

[10] Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367; Butler *v.* Phillips, 38 Colo. 378, 88 Pac. 480. In these cases the courts based their decisions on the fact that there was a *de jure* office already in existence, and that the unconstitutional statute related merely to the election or appointment to the office.

[11] Hildreth *v.* McIntire, *supra.*

[12] Lang *v.* Bayonne, 74 N. J. L. 455, 68 Atl. 90; Burt *v.* Railroad, 31 Minn. 472, 18 N. W. 285; Com. *v.* McCombs, 56 Pa. St. 436; Riley *v.* Garfield, 58 Kan. 299, 49 Pac. 85. See also, Donough *v.* Dewey, 82 Mich. 309, 46 N. W. 782.

of the legislature is presumed to be valid, and it is productive of much confusion and uncertainty to allow individuals who deal with public officers to question their authority in every instance. Especially is this true in regard to municipal corporations, and it is an established principle that the legal existence of a municipal corporation cannot be collaterally attacked.[13] But the courts seem not to have recognized the discrepancy in the two doctrines, and in practically all of the cases holding that the existence of a municipal corporation cannot be attacked collaterally have based their decisions on the doctrine upheld by the minority of the courts, that a person may be a *de facto* officer although the office is created by an unconstitutional statute, rather than on the ground that the existence of a corporation cannot be attacked collaterally.[14] In the recent case of *Wendt* v. *Berry* (Ky.), 157 S. W. 1115, a municipal corporation was organized under an unconstitutional statute, and it was held that citizens who had received benefits from improvements contracted for by the city must pay the contractor, as the officers of the city government were *de facto* officers.

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[13] St. Louis *v.* Shields, 62 Mo. 247; DILLON, MUN. CORP., § 43a.
[14] See note, 15 L. R. A. (N. S.) 105.